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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19____

TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,

Petitioner,

v.

MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

M. Ashley Dickerson
Dickerson & Gibbons, Inc.
1330 East 15th Avenue
Anchorage, Alaska 99501
(907) 376-5539
ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Has there been a denial of equal protection by the lower and appellate courts requiring that for a black person to enjoy the benefits of the Fourteenth Amendment and the protection of 42 U.S.C. § 1983 he must prove that the denials were because he was black or that the Municipality historically discriminated against blacks?

II. Has a black fire inspector, working for fire prevention for eight years, resigning because of a non-job related illness of hypertension been denied equal protection as guaranteed by the Fourteenth Amendment when denied benefit of Personnel Rule 5.2(b) and Agreement between the Municipality and union provision 10.1.3 by being allowed to return only as a new hire in fire

suppression as a fire fighter III and having his name omitted from the promotional and rehire list?

III. Has there been a violation of 42 U.S.C. § 1983 when the Municipality, the fire department and the fire fighters union jointly decide to limit the return of a black fire inspector in fire prevention for eight years, to return as a new hire as a fire fighter III in fire suppression in nine months without consideration of Personnel Rule 5.2(b) and Agreement 10.1.3?

IV. Can the alleged deniers of equal protection and alleged conspirators justify their actions against one minority by the substitution of another minority to that right?

V. Can the appellate court assess attorney fees under 42 U.S.C. § 1988

without a hearing against the attorney for a civil rights claimant when the lower court denied fees under 42 U.S.C. § 1988, finding federal claims were not frivolous and no appeal was taken from that ruling? (CR124)

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	v
JURISDICTION ON WRIT OF CERTIORARI.....	1
CONCISE STATEMENT OF CASE.....	3
REASONS FOR GRANTING THE WRIT.....	11
I. SPECIAL REQUIREMENT OF BLACK ANIMUS.....	11
II. DENIAL OF EQUAL PROTECTION.....	21
II. CONSPIRACY.....	28
IV. MINORITY SUBSTITUTION..	43
V. FRIVOLITY.....	45
CONCLUSION.....	46
APPENDIX	

TABLE OF AUTHORITIES

CASES CITED: PAGE

ADICKES v. S.H. KRESS & CO
308 U.S. 144 (1970)..... 13, 14

Alice COVERDELL v. The
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, STATE OF
WASHINGTON..... 14, 15
834 F.2d 758, 769 (9th Cir. 1987)

Iberia HAMPTON v. Edward V.
HANRAHAN..... 40
600 F.2d 600 (7th Cir. 1979)

MCDONNEL DOUGLAS CORPORATION
v. GREEN..... 12
411 U.S. 792, 93 S.Ct. 1817
(1973), 36 L.Ed. 688

MITCHELL v. GENERAL ELECTRIC
COMPANY.....13, 14
689 F.2d 877 (9th Cir. 1982)

VACA v. SIPES..... 18
386 U.S. 171, 87 S.Ct. 903 (1967)

Deborah WITTE v. MATANUSKA-
SUSITNA BOROUGH..... 17
787 F.Supp. 907 (1992)

CONSTITUTIONAL AMENDMENTS:

Amendment XIV, Section 1..... 2, 4
17, 18
21, 30
36, 39

LABOR AGREEMENT:

Labor Contract Agreement between Municipality of Anchorage and International Association of Firefighters..... 1, 3, 10, 17, 22, 32, 35, 44

RULES:

Municipality of Anchorage Personnel Rules Effective January 15, 1990..... 2, 3, 4, 17, 24, 25, 32, 35, 37

FEDERAL STATUTES:

42 U.S.C. § 1983..... 2, 4

42 U.S.C. § 1988.....11, 44, 46

28 U.S.C. § 1254(1)..... 1

JURISDICTION ON WRIT OF CERTIORARI

The jurisdiction of this court is invoked under provision of the Constitution of the United States, Article III Section 2 and 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a) since a United States Court of Appeals has so far departed from the accepted and usual course of judicial conduct and sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

Petitioner contends that pursuant to Supreme Court Rule 10A the Appellate Court for the Ninth Circuit has decided a federal question in a way in conflict with accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court for the District of Alaska. Petitioner further contends that the Court of Appeals for the Ninth Circuit has decided an important

question of federal law which has not been, but should be settled by this court and has decided that federal question in a way that conflicts with applicable decisions of this court.

The judgment sought to be reviewed was entered on the 11th day of February, 1994. The motion for rehearing was denied on the 4th of April, 1994. The order for attorney fees was entered on the fifth day of May, 1994. The order denying a stay of order granting attorney fees was entered on May 31st, 1994. Involved in the case are the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, Union Municipal Contract Agreement 10.1.3 and Personnel Rule 5.2(b). All are set forth verbatim in the argument or in the appendix.

CONCISE STATEMENT OF CASE

Suit was filed by Wilson, now deceased, first in the Superior Court of Anchorage but was removed by defendants below, respondents herein to the federal court. (CR7) The amended complaint dated December 31, 1992 against the Municipality of Anchorage, the Fire Department, the International Association of Firefighters Local 1264 included the union attorneys because of their failure to protect petitioner's husband's rights under Personnel Rule 5.2(b) and the contract between the Municipality and the union, 10.1.3. CR7-37-1 to 13. These provisions are set out in the argument at pp. 24 and 22, infra. These provisions gave decedent the right to return under 10.1.3 to his same position within two years, since he had resigned for a non-occupational

illness; and for any reason within one year under 5.2(b). His resignation letter stated he was resigning because of a non-occupational illness, namely hypertension, quoted herein verbatum, infra, p. 23. He sought injunctive relief for his immediate placement in the position to which he was entitled, to-wit, inspector, plans examiner, which position he had held for eight years, coming up through the ranks. He asserted a denial of his constitutional rights to due process and equal protection of the Fourteenth Amendment and 42 U.S.C. § 1983. Because of the fact that his right to his prior position had been denied him by the union, the Municipality and the fire department, who all got together and in writing informed him that he could not have his prior position but must instead come back as a new hire as a

fire fighter III, he asserted a cause of action for conspiracy. In writing, all parties participated by a letter of November 13, 1989. This letter is quoted verbatum, infra, pp. 33-35.

Although he accepted the ultimatum of coming back as a new hire, having to compete for his prior position, if he would ever regain it, he sought help from the union and the union attorney to correct the error without any success. Because of the enactment of the rule after he had, during his years as inspector, been threatened with demotion and the union attorney refused to resist it for him, he had hired his own attorney who successfully held his position for him without the demotion, the rule was enacted that only through the union attorney could a grievance be processed. (CR23-5) He

tried unsuccessfully to get the union to timely process his grievance for rehire. The attorney for the union refused to act but after discovering that the time limit had passed, to seek a correction of reinstatement rather than new hire, the union and the union attorney sought a promotion but under the wrong provision, since he was not injured. See excerpt from Arbitrator's Opinion, infra, pp. 25-26. The union recognized that it had made an error and wrote a letter expressing need for Exedrine because of the error, but the courts ignored this letter. Infra, p. 37.

The District Court judge granted summary judgment in favor of the attorneys, saying that a separate contract would have been necessary for an action to lie on behalf of an individual union

member, but ignored the limitations imposed on Wilson by the union and the Municipality. He found that the attorneys were possibly guilty of negligence, not gross negligence. CR28-1,2.

The union, Municipality, and the fire department extended the existing one year rehire promotional list to a two year list, making it harder for Wilson to ever regain his status. Substantial differences existed in fire suppression and fire prevention. If a person had worked in fire suppression, after being absent, he could only return as fire fighter III, but this did not apply to persons who worked in fire prevention where Wilson worked as a plans examiner. See letter of attorney, infra, p. 29. When he was allowed to come back not in fire prevention under the provisions of

which he should have had the benefit, but as a new hire under no provisions in existence, he was required to take extensive physical exams for fire suppression which he should not have been required to take in fire prevention. The work was more arduous than what he had been in for the last eight years. He died of a heart attack after having been back approximately three years.

Judge Singleton held that all defendants were entitled to summary judgment because of the fact that Wilson had been unable to show that the denials were because he was black. He held that the right to a promotion was not of sufficient importance to justify the claim of denial of equal protection. He relied on a failure to show that the unfair treatment was racially motivated,

evidently concluding that the only way Wilson could recover would be by showing that the treatment was racially motivated and that hiring of another minority evidently negated any claim of racial bias. He also held that Wilson failed to show that the fire department historically discriminated against blacks. It is the contention of the petitioner that her decedent had the same rights as any person of any other race to the equal protection of the law and due process. The judge held that he did not find the property interests implicated in the case of sufficient caliber to support a substantive due process claim. Wilson claimed that the rights were substantive and that he should have had the right to his same position since the law gave him that right. No reason was ever given for

denying Wilson the right to return to his previous position, or for leaving his name off the list, or for extending the list to a two year list, or for requiring that he must compete if he would ever become an inspector again. The arbitrator found that Wilson was covered under 10.1.3 and should have been on a promotional and rehire list and that actions brought before the arbitrator by the union attorney were under the wrong statutory provision. He further held that because of the failure to timely process the grievance under the right provision, the grievance had to be denied. The arbitrator did not have before him, however, the provisions by which Wilson was allowed to proceed only through his union and the union attorney and to do nothing on his own without the help of his

union and the union attorney, which help had been refused. The fire chief had refused to deal with Wilson directly.

The Ninth Circuit followed all reasoning of the lower court except, although the judge in the lower court had held that no attorney's fees would be awarded under 42 U.S.C. § 1988 since the federal claims were not frivolous and no appeal from that part of the decision was taken by the fire department nor by the Municipality, the Ninth Circuit still awarded $4,729.20 in attorney's fees against the petitioner and petitioner's attorney.

REASONS FOR GRANTING THE WRIT

I. SPECIAL REQUIREMENT OF BLACK ANIMUS

Although petitioner's decedent was not able to state that anyone had said to him they were doing this to him because of

the fact that he was black, and although petitioner's decedent had no evidence that the Municipality and the union historically discriminated against blacks, no explanation was ever given as to why petitioner's decedent was denied all of the benefits for which he had worked and to which personnel rules and union and municipal contracts entitled him. Petitioner's decedent relied on the doctrine of **McDonnell Douglas Corporation v. Green**, 1973, 411 U.S. 792, 36 L.Ed 688, 93 S.C. 1817. Inspector positions were being advertised while Wilson was applying and no legitimate business reason was ever given for denying Wilson one of those four positions. The court ignored all of this and held that there must be a showing of ethnicity as a basis for the denial.

In his opinion, Judge Singleton of

the District Court for the District of Alaska acknowledged the United States Supreme Court decision in **Adickes v. S.H. Kress and Company**, 398 U.S. 144 (1970), holding that summary judgment was improper in a 1983 action where the defendants did not meet the burden of negating the plaintiff's unsupported allegations of fact supporting conspiracy. He relied instead on Ninth Circuit decisions holding there had to be an affirmative burden on the plaintiff to come forward with some evidence of a conspiracy based on ethnicity in order for their claims to survive a summary judgment motion. He cited in support of same certain Ninth Circuit cases as **Coverdell v. Department of Social and Health Services**, 834 F.2d 758, 759 (9th Cir. 1987) and **Mitchell v. General Electric Company**, 689 F.2d 877

(9th Cir. 1982). He relied completely on a need to show a race based or a class based animus. If Wilson had been required to prove that in the conspiratorial actions, defendants had stated "we are doing this to him solely because he is black," it would have been impossible for him to ever prove race based animus, as seldom if ever would such evidence be available. In **Adickes**, supra, there was a denial of equal protection and due process even though no race was involved at all.

What the U.S. District Court for the District of Alaska did was to give a higher standing to Ninth Circuit cases than that given cases of the United States Supreme Court.

The Ninth Circuit followed the same action as shown by Appendix E, p. 4 of its memorandum by which it relied on its own

case of **Coverdell v. Department of Social and Health Services**, supra. The court concluded that Wilson could not point out anything in particular that indicated discrimination. However, the act itself of denying him the benefit of the personnel rules, union contract agreement, union representation and return as a rehire amounted to discrimination. Both courts failed to take into consideration the fact that there was a vast difference in fire prevention and fire suppression. Wilson had no obligation to ever go back to fire suppression, a more arduous branch of the service from which he had been absent for eight years, while working as a plans examiner in fire prevention. This evidently confused both courts. Wilson was denied the benefits of all of the provisions to protect union members and

employees of long standing and was forced to return as a new hire, where acting in a more arduous classification, he died of a heart attack three years later.

His widow has had to bear the brunt of the loss and the reduction in pay and benefits available to her. Nothing in the record indicated that fire fighter III was of the same classification but lower grade, yet both courts on their own in both cases have decided that fire fighter III was one grade lower than inspector, whereas they were in different classifications completely, one being in fire suppression and one being in fire prevention.

On pp. 12 and 13 of its memorandum opinion as shown in Appendix D, the Alaska U.S. District Court held as follows:

> When a case involves neither a supported allegation

> of discrimination based upon race, ethnicity, alienage or gender nor a claim alleging a deprivation of fundamental rights such as rights guaranteed by the First Amendment or the right to interstate travel, there's no substantive due process claim.

Query: What about Fourteenth Amendment rights? Is not the right to work as important as the right to travel?

The court cited its own opinion of **Witte v. Matanuska Susitna Borough**, 787 F.Supp. 907, 909 (D. Alaska, 1992). Evidently the court considered the right to rehire, the right to work, the rights guaranteed by 5.2(b) of personnel rules and 10.1.3 of the contract between the Municipality and the union, and the right to fair representation by the union as not embodying fundamental rights. Even though these provisions were quoted in all of petitioner's pleadings and briefs, both

courts ignored them. The court completely left out the Fourteenth Amendment and equal protection. Wilson considered his complete deprivation of rehire into his same classification and his requirement to become a new hire in a different classification as deprivations of equal protection of the law. He also considered his deprivation of union representation as guaranteed by the union contract and case law as enunciated in **Vaca v. Sipes**, 386 U.S. 171, 87 S.Ct. 903 (1967), as a further deprivation of equal protection of the law.

The judge by implication admitted there may have been a mistake at Appendix D, pp. 11 and 12 of his decision. There was no indication anywhere in the record as to "a position one grade lower than fire inspector" as stated by the judge at

Appendix D, p. 5 of his decision. The union admitted its error in its "excederin" letter found at p. 37, infra. Yet the judge ignored all of these. The judge refers to Wilson's "rehire with seniority and longevity adjusted to that of a new hire," although in fact there was no rehiring but actually a new hiring in Wilson's case, by which he was deprived of all of his rights accrued by his many years of service.

Four inspector positions were vacant and filled by others during the period that Wilson was requesting rehire as an inspector (Appendix D, pp. 5, 6) and both courts have emphasized that one of those was filled by a minority, but no reason for not giving one of them to Wilson was ever given.

The statement of Wilson having

admitted in his deposition that he could not point to anything in particular that indicated discrimination is totally erroneous as the true text of that part of the deposition was that he could not name a particular discriminatory act based only on race. The deposition as a whole supported a denial of equal protection and due process. Wilson had no proof of anyone saying to him "We are doing this only because you are black," which seems to be what the courts below are requiring. This is not the law.

Special black discriminations? A separate burden is placed upon a black person here. His constitutional rights to equal protection were abridged, yet he was arbitrarily denied relief. The only justification is apparently because it was not done to him because he was black. He

is thus denied equal protection but given a segregated slot under which we must prove his special denial.

The deceased was entitled to the same rights as given by the Fourteenth Amendment to all persons regardless of color. No legitimate business reason was ever given for the denial of Wilson's due process and equal protection rights. This showed a failure on the part of the defendants to meet their **McDonnel Douglas Corporation v. Green**, supra, burden.

II. DENIAL OF EQUAL PROTECTION

The courts below have overlooked certain material facts and law in their decisions. Of utmost importance is the failure of the courts to recognize the termination of the deceased as having been for medical reasons. Both opinions merely cite that he "voluntarily terminated his

employment." The arbitrator found at pp. 25 and 26 of the Decision and Award that:

> The provision of Article Number Ten which does clearly cover Mr. Wilson is Article 10.1.3. That article states as follows:
>
> > 'Any former employee of the various job classifications covered by the agreement, or any preceding agreements, who terminated due to non-occupational injury or illness will be granted preferential reemployment rights (emphasis added) after occupational injury applicants and employees. Such reemployment rights shall be conditioned on medical certification of the person's physical or mental ability to perform the job for which they are applying and their passing entry physical ability test as required by the job description. Such preferential reemployment rights shall be predicted [sic] on the existence of an open position, regardless of vacancy factor.'
>
> Mr. Wilson meets all of the

> criteria of this provision. He is a former employee who has enjoyed a number of years of successful service in a job classification covered by the labor contract. He terminated his relationship with the Anchorage Fire Department in July, 1989. That termination, at least in part, is due to a nonoccupational illness. As such, he is entitled to preferential re-employment rights after certain other individuals. There was no showing for the record by either party whether there were occupational injury applicants for positions with the Anchorage Fire Department who sought either the position of Firefighter III or who might be seeking the position of Fire Inspector...

Wilson on July 7, 1989 gave notice of resignation for medical reasons, as follows:

> As of July 7, 1989, I am terminating my employment with the Anchorage Fire Department because of a nonoccupational, medical disability (hypertension). CR53-27

The statement regarding Wilson

offering only "conclusory allegations" is erroneous. The only evidence taken was before the arbitrator on September 27th and September 30th, 1991. On p. 12 of the arbitrator's Decision and Award, offered by all parties, we find the following language:

> 5.2(b). Rehire List
>
> An employee who separated in good standing may have his name placed on a rehire list for the same class of position, or a lower class in the same or a parallel series (emphasis added) with the advance approval of the Director, provided he so requests in writing within one year from date of separation. Names of employees eligible for rehire shall be certified as additional, unranked, eligibles on promotional and open-competitive eligible lists. Eligibility to remain on the rehire list expires one year from date of separation. (Personnel Rules, Effective January 15, 1980, Municipality of Anchorage)

Both courts below have ignored the

arbitrator's findings and conclusions of the arbitrator at p. 20 as follows:

> Even putting aside any argument that Mr. Wilson would have been entitled to a fire inspector position at about the time of his rehire and assuming he would have opted for such a position rather than be rehired as a firefighter III -- had he only known that he might have had his name on a rehire list for the fire inspector position, it is not possible to see the employer's actions.
>
> The actions questioned were:
>
> (1) In refusing to list Mr. Wilson as an unranked but qualified eligible, or (2) its refusal to allow him to 'leap frog' other members on the promotional list as anything other than 'actions' which give rise to a grievance.

The arbitrator concluded that in June, 1990 when Mr. Wilson was rehired:

> ...There were two open positions for fire inspectors. Individuals were promoted to those positions at about the time of Mr. Wilson's reemployment.

The arbitrator concluded at pp. 27 and 28

that:

> Mr. Wilson was not informed about these positions, was not on a rehire list for these positions, and it seems that in an ideal world he should have both been told and been considered for rehire into one of these positions.

The arbitrator further concluded at p. 28, however, that:

> ...Mr. Wilson nonetheless is not forever excused from his obligations to proceed with the filing and processing of a grievance in a 'relatively' timely fashion.

His forced union grievance procedure and forced union attorney as his only procedure tied his hands. This could not be brought out in arbitration as the union and the union attorney were the parties in charge. Only through the court could this be shown with a different attorney.

The arbitrator could find no reason for the time for filing of the grievance

to extend beyond December 30, 1990. It was only because of the failure to timely file the grievance that the arbitrator found in favor of the Municipality of Anchorage rather than in Mr. Wilson's favor.

Langston admitted his authority to place the deceased ahead of the new hire list as follows in response to question 17, CR53-58-p3:

> 17. As per the Personnel Rules, I have the authority to place you ahead of the new hire list.

The "magical" list over which the deceased was advised in Chief Langston's "leap frog" letter he could not jump, was created after the deceased had indicated his intention to return to his employment. Exhibit 3, sent to all personnel on the 17th day of November, 1989, CR53-30 provided:

> For 1990, there is a potential of two new inspector positions becoming available. We will be testing for those positions in February and utilize the same basic process as we will be using in December. We will not create a list but instead do a one time appointment for those positions. I'll keep you posted and provide necessary information for those interested.

III. CONSPIRACY

The arbitrator at pp. 27 and 28 of his findings stated that Mr. Wilson should have been on that list. Provisions for creating the list are covered by the statement therein, "...We will not create a list but instead do a one time appointment..." CR53-30. No reason was ever given for keeping Mr. Wilson off the list. His absence therefrom was utilized against him by Chief Langston, Cornelius, the union president, and the union executive board as follows:

> Jesse, I have reviewed your request for promotion to the next available inspector's position with Union President, Tim Cornelius. Your situation was also reviewed with the Union Executive Board several days ago. It is our position that you are not eligible to "leap frog" ahead of department members on the current promotional inspector's list. As stated in the terms of your rehire agreement dated November 13, 1989, you will be eligible to compete for an inspector position in the next promotional period.

JDO was fully aware of Wilson's rights to return as an inspector. Its letter of October 3, 1990 to the union contains the following language:

> An employee seeking to be re-hired within two years of his termination can go directly to the position formerly held if the position is not fire suppression. 10.1.1.1. Since Jessie's [sic] old position was in fire inspection and not fire suppression, he should have been hired back as a fire inspector. He wasn't. CR53-49-p2

The courts below have failed to

recognize a denial of equal protection of the law and denial of due process as guaranteed by the Fourteenth Amendment by the way in which the union, the Municipality, the Fire Department and JDO ignored the personnel rules and union contract agreements. The courts below have become victims of the manner in which all defendants below obfuscated these provisions.

The denial of these benefits to a person by the combination of the union, the union attorney, the Municipality and the fire department amounts to a conspiracy.

The letter of October 3, 1990 written by the lawyer for Wilson and the union was within the grievance period which did not end until December 30, 1990 (CR53-49), yet the lawyers did nothing. How then could a

court grant summary judgment in favor of the union and the lawyer for the member and the union? The District Court held that a separate contract was necessary between the attorney and union member yet the lawyer signed as attorney representing the union and Wilson (CR80-14). Besides, since the member was boxed in to grieve only through the union and union attorney, he was helpless (CR52).

The courts below were confused by the contention of the Municipality that Wilson was in fire suppression yet the lawyer's letter, supra, of October 3, 1990 should have dispelled the idea.

No explanation was ever given as to why despite the mandate that an employee who separated in good standing must have the right to return to his same position in one year under 5.2(b) and within two

years under 10.1.3 since he resigned because of a non-occupational illness, labile hypertension, Wilson was denied this right. The denial of this right was definitely a denial of the equal protection of the laws. The courts below ignored these mandates.

The decisions ignored the "leap frog" letter of Chief Langston by which the deceased was told that he could not "leap frog" over those persons on the promotional list. The Chief ignored the right of the deceased to be on that list as found by the arbitrator at pp. 27 and 28 of his decision as provided by regulation 5.2(b). There is also a denial on the part of all municipal agents, union agents and personnel agents of the right of Wilson to be on the list for one year. It is significant that by extending the

one year list to a two year list Wilson was further denied the equal protection of the law. (CR53-54-p2) No new promotional period was ever given, thus requiring Wilson to serve three years in the inferior capacity until his death without a chance to ever regain his rightful position.

The thrust of Wilson's case was denial of equal protection and due process by failure to rehire into his previous position. It was only the error of the union in joining in the conspiratorial letter (CR53-29) which led to the union's attempt to obfuscate that denial by seeking a promotion for him. The letter dated November 13, 1989 said:

> I thought it might be of some help to you to write down several of the points we discussed on the phone last week on your possibility of coming back to the Anchorage Fire

Department. I have had discussions with Tim Cornelius with the IAFF and Neil Koeniger with the Municipal Personnel Office in clarifying those issues that were of concern to you regarding rehire. The following is a summary of those discussions:

1) You will need to draft a letter to us requesting rehire in accordance with the rehire provisions in the Firefighter Contract. You should request rehire to the Firefighter III classification and include the date that you would be available. Your seniority date will be your new date of hire.

2) You will need to take a firefighter physical ability test prior to being accepted into the Suppression Division.

3) Once you become a member of the Fire Department, you will be eligible to compete for an inspector's position.

4) We will need a thorough medical release from your attending physicians that you are able to now work as a firefighter.

Signed by Larry J. Langston, Fire Chief; Neil Koeniger, Manager, Employee Relations-Personnel Office; Tim Cornelius, President, IAFF Local 1264.

This was a definite denial of due process and equal protection. By this combination of all defendants his 5.2(b) rights and his 10.1.3 rights were taken away. This was a conspiracy.

The contention by the Court of Appeals that the SPASE test is required of all persons entering into the fire suppression field is without a true foundation as it fails to recognize that deceased, plaintiff below, should have been returning to fire prevention where he had been for eight years, not demoted to fire suppression. If he had been given his Fourteenth Amendment rights to equal protection, no SPASE test would have been required. The firm of JDO had admitted

that he was not in fire suppression, but in fire prevention as shown by its letter of October 3, 1990, supra, p. 29.

The false statement of the Municipality that deceased had been in fire suppression resulted in irreparable injury to the case. It misled the court below and has misled the appellate court into failing to see the denial of equal protection resulting, as only in fire suppression was such a test required.

If only the union and Municipality had not by a change of rules made it impossible for Wilson to have grieved his illegal re-hire without the union, he could have done same in a timely manner. The record is replete with Wilson's attempts to get his union and attorney to move on his behalf in a timely manner. The union, by its "excederin" letter dated

July 10, 1991 quoted below admitted that Wilson should have been rehired as an inspector. It stated:

> As discussed Jesse Wilson should have been placed as an unranked eligibile [sic] pe: personnel rule 5 (b). This was recently discovered as Jesse and Ken McCoy were exploring the questions of under what rule was Jesse hired. What if any benifit [sic] to Jesse is there when considering PPI5100-004 sec. 3.4.9 along with now being listed as an unranked eligible. Enclosed are the relevant documents. thanks Chuck, Julie, Brad Ownens [sic] and the entire JDO staff who must resort to excederin [sic] assisting with difficult Firefighter issues!!!!!" CR53-50

It was obviously an attempt to cover the failure of the union and JDO to move in a timely manner that led to the futile filing by JDO under the wrong provision. As found by the arbitrator the proper remedy was wrongful rehire - not denial of promotion. The Appellate Court has

likewise been misled into treating this as a denial of promotion case. The promotion aspect was merely a "save face" gesture on the part of JDO and the union to cover up for its wrongful delays and knowing reliance upon the wrong sections.

All of this was ignored by the courts below. Despite the law of the Ninth Circuit as set forth in the case of **U.S. v. Washington**, 774 F.2d 1470 (9th Cir. 1985) and **Milgard Tempering, Inc. v. Selas Corp. of America**, 902 F.2d 703 (9th Cir. 1990) that an appeal from an entry of summary judgment requires a de novo review, the 9th Circuit appears to have merely reiterated the opinion of the court below.

Both courts have in fact construed the fact that the deceased was permitted to take the SPASE test three times in

favor of the respondents to show lack of racial bias. They failed to recognize that he should not have been returning to fire suppression. They failed to recognize that after eight years as an inspector, returning to the rigors of fire fighting might be indicative of an invitation to the heart attack from which he died after three years at age 39.

The plaintiff started off with his Fourteenth Amendment rights, emphasizing due process and equal protection. In the state court, state statutes which reiterated those same rights were quoted. No rulings were made in the state court before the removal of the case by the defendants. The fact that Wilson was black was of course alleged as a fact. The conspiracy aspect became obvious not only by the joint letter of all

defendants, ignored by the courts below, but creation of the one year list omitting his name and the extension of the "list" into a two year list omitting his name with the concurrence of all defendants. Meetings were held by all defendants without the presence of plaintiff, i.e., the "leap frog" letter, supra, p. 29, and the one where the decision was made by all defendants that the union would not back Wilson without notice to Wilson (CR53-51; October 24, 1991 letter, Appendix K). In the case of **Hampton v. Hanrahan**, 600 F.2d 600, 627 (7th Cir. 1979), it was held that when a plaintiff alleges a conspiracy to violate civil rights, existence or non-existence of conspiracy is essentially a factual issue that the jury, not trial judge, should decide. Summary judgment in the case before us was improper.

The alleged dismissal of state claims without prejudice is of no substance as the same facts support all claims. There was nothing left for the state court to decide as the federal court had placed its interpretation on certain facts and ignored others. The state court would have to overrule the federal court.

In denying plaintiff's motion to remand, the District Court stated at CR41:

> Wilson asked that this court remand the state law claims but retain the federal law claims. See Motion to Remand at Docket 33. The claims are so intertwined that they cannot be separated. If Wilson dismisses all of his federal claims and proceeds solely on his state claims, the court will remand so that he can try them in the state court. Otherwise all parties have a right to have all claims resolved in a single trial.

With this having been laid down as the law of the case on October 19, 1992, it is

difficult to understand how Judge Singleton in his final decision stated just the opposite. In his amended order, June 15, 1993, CR131-7, he states:

> ...where the federal claims are dismissed prior to trial, or where state issues substantially predominate, the state claims should also be dismissed. (Id. **United Mine Workers of America v. Gibbs**, 383 U.S. 715 (1966)) Thus, in view of the circumstances of this case and in the exercise of my discretion, I dismiss this case as to Wilson's state law claims without prejudice to any rights he may have to pursue these claims in state court.

There are no comparable cases to this one. This court has not ruled on the rights of the individual union member when his union deserts him or joins in the deprivation of his civil rights. The union has admitted its error but the court still granted it summary judgment (CR53-50). The Municipality falsely puts the

plaintiff in fire suppression rather than fire prevention to justify its error, yet the court granted it summary judgment despite the fraud.

Wilson was unable to move on his own and his union and the union attorney refused to do so expeditiously. When he attempted on his own to plead his case to the fire department, Chief Langston, by certified letter of January 26, 1991 stated:

> ...However, the union is the sole and exclusive representative concerning conditions of employment for bargaining unit members, therefore, you should contact your Union, Local 1264 for answers about labor/rehire concerns. CR52.

This is an issue that has not been covered in any of the decisions of this court.

IV. MINORITY SUBSTITUTION

The court below left the definite

conclusion that for the deceased to prove any phase of his case he had to show it was because of being black. Both courts below have emphasized the fact that one of the persons promoted was a minority. There was no proof of this from either side but the lower courts emphasized the promotion of this alleged "minority" but failed to in any manner address the denial of the right of the deceased to rehire or even address the provisions justifying his contentions to that right under 5.2(b) and 10.1.3. Where does minority substitution arise? Is it the conclusion that if a black is applying, another black can be substituted, or can an Hispanic or an Indian be substituted? This issue has never before been raised in civil rights litigation.

The statement that one of the persons

promoted into the inspector's position to which Wilson claims he should have been rehired was a minority gives no justification for the denial of equal protection of the law to Wilson. Can one minority be justly denied his constitutional rights by the substitution of another mincrity to that right? Is this to be regarded as the law of the land?

The impression is left that a black person's constitutional rights may be infringed upon with impunity unless it is proved that the infringement was because he was black.

V. FRIVOLITY

Substantial civil and economic rights faced Jesse Wilson. He relied on his rights as guaranteed by the United States Constitution, the personnel rules, the

union contract and union representation. These rights were not protected by the courts. The initial federal judge ruled that the federal claims were not frivolous. Yet the court of appeals assessed 42 U.S.C. § 1988 sanction fees against the attorney representing Wilson. Is this a method of stifling civil rights by denying access to lawyers who dare to try to help civil rights litigants?

CONCLUSION

Substantial questions pertaining to application of equal protection, conspiracy and ethnicity superimposed upon these rights have created new issues in this case. The impression is left that a black person's rights may be infringed upon with impunity unless he can prove that the infringement was because he was black. A black person is by this case

deterred from asserting these rights and attorneys should be deterred from prosecuting said cases, lest they be destroyed by sanctions. A black worker can be denied the job without explanation and his life and health are of no value.

DATED at Wasilla, Alaska this 27. day of June, 1994.

DICKERSON & GIBBONS, INC.

BY M. Ashley Dickerson
M. ASHLEY DICKERSON

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19____

TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,	)
Petitioner,	)
v.	)
MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,	)
Respondents.	)

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

M. Ashley Dickerson
Dickerson & Gibbons, Inc.
1330 East 15th Avenue
Anchorage, Alaska 99501
(907) 376-5539
ATTORNEYS FOR PETITIONER

APPENDIX

Appendix A1-2	Order of Ninth Circuit denying motion for stay of award for attorney's fees dated May 31, 1994
Appendix B1-2	Order of Ninth Circuit denying rehearing dated April 4, 1994
Appendix C1-3	Order from chambers dated March 16, 1993 holding federal claims not frivolous
Appendix D1-16	Order dated February 1, 1993 granting summary judgment to all defendants
Appendix E1-6	Memorandum, decision of court of appeals, Ninth Circuit, dated February 11, 1994 (1 through 3)
Appendix F1-2	Order, Ninth Circuit, dated May 5, 1994, awarding attorney's fees against personal representative and her attorney
Appendix G1-24	Amended Complaint from the U.S. District Court at Anchorage

Appendix H1-2	Judgment from the U.S. District Court at Anchorage
Appendix I1	42 U.S.C. 1983
Appendix J1	Fourteenth Amendment
Appendix K1-3	Letter dated October 24, 1990

FILED
MAY 31 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE WILSON; TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,	)	Nos. 92-36885, 93-35344, 93-35345
	)	D.C. No. CV 92-00291-JKS
Plaintiffs-Appellants,	)	
v.	)	
MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,	)	ORDER
Defendants-Appellees.	)	

ord 4 atty. fee

A 1-2

Before: REAVLEY,* SKOPIL, and LEAVY, Circuit Judges.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

Appellant's motion for stay of the award of attorney's fees is denied.

FILED
APR - 4 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE WILSON; TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,	)	Nos. 92-36885, 93-35344, 93-35345
	)	D.C. No. CV 92-00291-JKS
Plaintiffs-Appellants,	)	
v.	)	
MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,	)	ORDER
Defendants-Appellees.	)	

Before: REAVLEY,* SKOPIL, and LEAVY, Circuit Judges.

---

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

The panel has voted to deny the petition for rehearing. Judge Leavy has voted to reject the suggestion for rehearing en banc, and Judges Reavley and Skopil have so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED
MAR 16 1994
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

MINUTES OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Jesse Wilson v. Municipality
of Anchorage, et al.
Case No. A92-291 Civ.
By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Marvel Hansbraugh, Case Management: 271-5575*

PROCEEDINGS: ORDER FROM CHAMBERS

The law firm of Jermain, Dunnagan & Owens, P.C., seeks attorney's fees from plaintiff after successfully moving for and obtaining summary judgment. See Docket Nos. 88 and 90. The Court found that Wilson did not have evidence sufficient to raise a fact issue regarding his claim of civil rights violation. No attorney's fees are awarded on this ruling because Wilson's federal claims were not frivolous. See 42 U.S.C. § 1988. The Court also ruled on Wilson's state law claims **as to this defendant only** and concluded that Wilson did not establish an attorney-client relationship and therefore could not sue for malpractice under state law. The Court also implicitly found that Wilson had not established factually a basis for holding that this defendant owed him a duty independent of the attorney-

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* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER.

client relationship. The Court, therefore, granted this defendant summary judgment on the state law claims as well. Under Alaska state law a prevailing defendant is entitled to an award of partial attorney's fees. See Alaska Rule of Civil Procedure 82, made applicable in this Court to state law claims by Local General Rule 21.1. Alaska cases do not use the loadstar approach to fixing attorney's fees. The Court is directed to exercise discretion and reach a fair result in light of the issues litigated and the result obtained. In this case I have considered the preliminary work done by the defendant law firm and the subsequent work done by its retained counsel. I conclude as follows:

IT IS THEREFORE ORDERED:

Defendant Jermain, Dunnagan and Owens, P.C., shall recover from plaintiff Jesse Wilson the sum of $4,500 as partial attorney's fees in this case. The clerk may enter judgment in favor of this defendant and against the plaintiff in this amount.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE:March 16, 1993SECRETARY'S INITIALS:ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER.

CY: A. Dickerson

L. Schumacher (MUNI)
C. Dunnagan (JERMAIN)
Appeals Clerk

FILED
FEB 01 1993

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By _____/s/_____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JESSE WILSON,

Plaintiff,

vs.

MUNICIPALITY OF ANCHORAGE, ANCHORAGE FIRE DEPARTMENT and INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264 and JERMAIN, DUNNAGAN & OWENS, P.C.,

Defendants.

Case No. A92-291 Civil

ORDER

Jesse Wilson ("Wilson") sues the Municipality of Anchorage ("Municipality"), the Anchorage Fire Department ("Department"), and the

International Association of Fire Fighters, Local 1264 ("Union"), alleging that he was wrongfully rehired into a lower grade position than the position he had previously voluntarily terminated, and that he was thereafter wrongfully refused a promotion to his former grade level. He asserts three causes of action: (1) racial discrimination pursuant to AS 18.80.210 and AS 18.80.220; (2) civil conspiracy pursuant to 42 U.S.C. § 1983 (and see 42 U.S.C. § 1985); and (3) breach of the Labor Contract Agreement ("Agreement"). This Court has federal question jurisdiction over Wilson's 42 U.S.C. § 1983 claim, see 28 U.S.C. §§ 1331 and 1343, and supplemental jurisdiction over the other two state law claims, see U.S.C. § 1367.

Defendants have requested oral argument in this case, at Docket Nos. 60

and 68. Oral argument may be dispensed with when the facts and legal arguments in a case are adequately presented in the briefs and record and the decision-making process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(c); Local General Rule 5(C); see also Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp., 933 F.2d 724, 728 (9th Cir. 1991), cert. denied, 112 S. Ct. 1295 (1992). I find that the facts and legal arguments in this case have been adequetely briefed and therefore **DENY** defendants' request for oral argument.

STATEMENT OF FACTS

Wilson was employed by the Anchorage Fire Department from 1974 through July 7, 1989, when he voluntarily tendered his resignation. Wilson suffered

from hypertension, both at the time of his resignation and before, and this condition may have been aggravated by job-related stress. Several years prior to his voluntary termination, Wilson had applied for retirement system disability benefits of a temporary occupational nature, but this application was rejected on the grounds that his condition was controllable.

After resigning from the Department, Wilson moved to California, enrolled in seminary classes and pursued other employment. Commencing in November of 1989, Wilson began communicating with the Department concerning whether he could be reinstated in his former position as Fire Inspector. In November of 1989, Wilson received a letter from Fire Chief Larry Langston, ("Langston"), which was concurred in by Neil Koeniger

("Koeniger"), Manager of the Employee Relations-Personnel Office, and Tim Cornelius ("Cornelius"), President of the Union. The letter set forth conditions of Wilson's rehire as a Firefighter III, a position one grade lower than that of Fire Inspector, and stated that upon rehire as a Firefighter III, Wilson would be eligible to compete for his former position.

Wilson returned to Anchorage after spending approximately one and one-half years away, and he was rehired by the Department on May 24, 1990, as a Firefighter III. His seniority and longevity with the Department were adjusted to that of a new hire. Around the time of his rehire, two Fire Inspector positions became available and were filled by other people. Two additional Fire Inspector positions subsequently became

open and were filled by others.

Wilson filed a grievance with his union on July 31, 1991, alleging: (1) that he should have been reinstated in his position as Fire Inspector upon rehire; and (2) that in the alternative, that he should have been promoted to Fire Inspector automatically after having been rehired as a Firefighter III. Wilson's case went to arbitration, and the arbitrator ruled in favor of the Municipality, finding that Wilson's grievance was not timely filed with respect to his first claim, and that the labor contract did not provide for the type of relief requested in Wilson's second claim.[1] Neither party appealed the

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[1] Certain of the arbitrator's factual findings were favorable to Wilson, such as his finding that Wilson's initial voluntary termination was the result of a nonoccupational illness. Wilson argues that this Court is bound to accept the factual

arbitrator's decision. Wilson brought the present action before this Court, and both sides have filed motions for summary judgment, at Docket Nos. 44, 53 and 62.

DISCUSSION

I. WILSON'S 42 U.S.C. § 1983 CLAIM.

To prove a prima facie case under 42 U.S.C. § 1983, Wilson must prove that the conduct complained of was committed by a person acting under color of law, that there was state action, that there was a conspiracy to deprive Wilson of his rights, and that there was an actual deprivation of rights. Parratt v.

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findings of the arbitrator. However, I conclude from a review of the case law that such findings are not binding on this Court. See McDonald v. City of West Branch, Michigan, 466 U.S. 284, 287-91 (1984). The Court may, of course, consider the arbitrator's decision in reaching its own conclusions. Id. at 292-93 n. 13. My decision is not inconsistent with that of the arbitrator.

Taylor, 451 U.S. 527 (1981), overruled on other grounds, 474 U.S. 327 (1986); Hampton v. Hanrahan, 600 F.2d 600, 622-23 (7th Cir. 1979). Initially, I will consider the evidence that has been presented to establish a conspiracy and the character of the rights of which Wilson claims to have been deprived.

a. Existence of a Conspiracy.

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton, 600 F.2d at 620-21, quoting Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973). To

defeat the Municipality's motion for summary judgment on his 42 U.S.C. § 1983 claim, Wilson's evidentiary submissions on the conspiracy element must meet a standard which has evolved from that originally set forth in Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970), to the more exacting summary judgment standards adopted by subsequent courts. See Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Although in Adickes, the Supreme Court held that summary judgment was improper in a § 1983 action where the defendant's materials did not meet the burden of negating the plaintiff's unsupported allegation of facts supporting a conspiracy, later courts have held there to be an

affirmative burden on plaintiffs to come forward with some evidence of a conspiracy in order for their claims to survive a summary judgment motion. See, e.g., Coverdell v. Department of Social and Health Services, 834 F.2d 758, 769 (9th Cir. 1987); Mitchel v. General Electric Co., 689 F.2d 877 (9th Cir. 1982); cf. Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988) (nonmoving party assigned the burden of showing what material facts were likely to be discovered in the future that would preclude summary judgment). In Coverdell, 834 F.2d at 769, the court stated that the defendant had met her initial burden in support of her summary judgment motion by merely pointing out to the court the absence of any evidence that her actions had been motivated by racial or other class-based animus. The burden then shifted to the plaintiff to come up

with some evidence that would raise a genuine issue concerning the defendant's motivation. Id.

In the instant case, beyond the bare fact that Wilson is black, there appears to be no support for his claim that the allegedly unfair treatment he received was racially motivated. Neither does Wilson proffer any evidence suggesting that the Fire Department has historically discriminated against blacks. In fact, one of the persons promoted to a Fire Inspector position in December of 1989 was apparently a minority. (See Docket No. 70, Exhibit X at 3.) I am unable to infer a racially motivated conspiracy to deprive Wilson of his constitutional rights from the fact that Langston, Koeniger and Cornelius all concurred in an interpretation of Wilson's contractual rights which may have been

erroneous. A common error is not enough to support a civil conspiracy claim. This is particularly true where the error is understandable given the confusion concerning the reasons for Wilson's voluntary termination. Thus, I conclude that the defendants have met their burden of showing an absence of evidence necessary to support Wilson's claim of a conspiracy to deprive him of his constitutional rights pursuant to 42 U.S.C § 1983, and that plaintiff has not met his corresponding burden to rebut that showing.

b. Character of the Rights of Which Wilson was Allegedly Deprived.

When a case involves neither a supported allegation of discrimination based upon race, ethnicity, alienage or gender, nor a claim alleging a deprivation

of fundamental rights, such as rights guaranteed by the First Amendment or the right to interstate travel, there is no substantive due process claim. See e.g., Witte v. Matanuska-Susitna Borough, 787 F. Supp. 907, 909 (D. Alaska 1992). In Witte, this Court held that an employee's property interest in her promotion is not deserving of the same protections given to fundamental rights. Id. Witte involved a claim of breach of an employment contract very similar to that presented by the instant case. In the instant case, Wilson asserts that his rights were violated because he was not rehired as a Fire Inspector, because he was not thereafter promoted, and because his seniority and longevity were adjusted to that of a new hire. For the reasons articulated in Witte, I do not find that the property interests implicated in this case are of

sufficient caliber to support a substantive due process claim. Wilson does not contend that he was deprived of procedural due process.

Accordingly, Wilson's request for summary judgment is **DENIED**, and this case is DISMISSED WITH PREJUDICE with respect to Wilson's 42 U.S.C. § 1983 claims.

II. WILSON'S STATE LAW CLAIMS.

Wilson also alleges: (1) racial discrimination pursuant to AS 18.80.210 and AS 18.80.220, and (2) breach of the Labor Contract Agreement. It is well settled that the exercise of supplemental jurisdiction is discretionary with this court. See 28 U.S.C. § 1367(c); United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Where the federal claims are dismissed prior to trial, or where state

issues substantially predominate, the state claims should also be dismissed. Id. Thus, in view of the circumstances of this case and in the exercise of my discretion, I **DISMISS** this case as to Wilson's state law claims **WITHOUT PREJUDICE** to any rights he might have to pursue these claims in state court.

III. OTHER MOTIONS.

I have considered defendants' motion to strike at Docket No. 61 and plaintiff's motion for sanctions at Docket No. 66 and find them to be without merit.

IT IS THEREFORE ORDERED:

Wilson's motion for summary judgment at **Docket No. 53** is **DENIED**, and this case is **DISMISSED WITH PREJUDICE** with respect to his state law claims. Defendants' motions for summary judgment at **Docket Nos. 44** and **62** are **GRANTED**.

In addition, defendants' motion at **Docket No. 61** and plaintiff's motion at **Docket No. 66** are **DENIED.**

DATED at Anchorage, Alaska this 31 day of January, 1993.

/s/
HONORABLE JAMES K. SINGLETON, JR.
United States District Court Judge

CC:
M.A. Dickerson
L. Schumacher (MUNI)
C. Dunnagan (JERMAIN)

FILED
FEB - 11 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE WILSON; TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased, Plaintiffs-Appellants, v. MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C., Defendants-Appellees.	Nos. 92-36885, 93-35344, 93-35345 D.C. No. CV 92-00291-JKS MEMORANDUM*

Appeal from the
United States District Court

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

District Judge, Presiding

Submitted February 4, 1994**
Seattle, Washington

Before: REAVLEY,*** SKOPIL, and LEAVY, Circuit Judges.

This appeal by Jesse Wilson is from the district court's entry of summary judgment in favor of appellees: the Municipality of Anchorage ("the MOA"), the Anchorage Fire Department (the "AFD"), the International Association of Firefighter's, Local 1264 ("the union"), and the union attorneys, Jermain, Dunnagan and Owens ("JDO").

Jesse Wilson, a black fire inspector for the city of Anchorage, voluntarily

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** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

*** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

terminated his employment and moved to California. Wilson returned to Alaska in less than a year and was rehired as a "Firefighter III," a position one step below that of inspector. Wilson argues that under Labor Union contract provisions, Alaska law and the Fourteenth Amendment, he should have been rehired as an inspector. In the alternative, he alleges he should have subsequently been preferentially promoted to fire inspector. Wilson contends that the city rehired him as a firefighter (instead of as an inspector) in agreement with the union, JDO, and the AFD, because of a civil conspiracy pursuant to 42 U.S.C. Sec. 1983, which Wilson claims deprived him of his constitutional rights to due process and equal protection. The district court rejected Wilson's claims and entered summary judgment in favor of the

defendants. We affirm.

1. A plaintiff cannot survive a motion for summary judgment in a civil rights action without offering some supporting evidence of a civil rights violation. Coverdell v. Department of Social & Health Serv., 834 F.2d 758, 769 (9th Cir. 1987). Conclusory allegations of discrimination are insufficient. Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985). Here, Wilson did not offer anything other than "conclusory allegations," and admitted in his deposition that he could not point out anything particular that indicated discrimination. Wilson argues on appeal that he was forced to undergo numerous tests, such as the Standard Physical Abilities Screening Exercise Test, in order to be rehired as a firefighter, but this test is routinely administered to all

firefighters applying for a fire suppression position. Wilson failed the test twice and was allowed to retake it until he passed. No discrimination may be inferred there. Furthermore, a minority was hired in one of the available inspector positions that Wilson claims he did not receive. Wilson does not present any evidence tending to prove that a racially discriminatory purpose was behind the rehire agreement; he only alleges a "conspiracy." A mere allegation of conspiracy will not save the nonmovant from summary judgment. Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983).

2. Wilson also argues a breach of the Collective Bargaining Agreement and Personnel Rules under state law. We need not discuss these claims as they were not adjudicated in the district court and were dismissed without prejudice. See United

Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966).

The summary judgment in favor of all defendants, including the law firm of the union, are affirmed.

AFFIRMED.

FILED
MAY - 5, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE WILSON; TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,	)	Nos. 92-36885, 93-35344, 93-35345
	)	D.C. No. CV 92-00291-JKS
Plaintiffs-Appellants,	)	
v.	)	
MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,	)	ORDER
Defendants-Appellees.	)	

Before: REAVLEY,* SKOPIL, and LEAVY, Circuit Judges.

The motion for attorney's fees filed

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

April 15, 1994, by defendants Municipality of Anchorage and Anchorage Fire Department is granted. Attorney's fees are awarded in the amount of $4,729.20. Wilson's counsel is held jointly and severally liable for payment of the fees.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JESSE WILSON,	)
	)
Plaintiff,	)
	)
vs.	)
	)
MUNICIPALITY OF ANCHORAGE AND ANCHORAGE FIRE DEPARTMENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264 AND JERMAIN, DUNNAGAN & OWENS, P.C.	)
Defendants.	)
	)

Case No. A92-291 CI

AMENDED COMPLAINT FOR VIOLATION OF CIVIL AND EMPLOYMENT RIGHTS, BREACH OF CONTRACT
(AS. 18.80.210; AS 18.80.220;)
LABOR CONTRACT AGREEMENT 10.1.3;
PERSONNEL RULE 5.2(b) & (c)
U.S. CONSTITUTION 14TH AMENDMENT,
42 USC 1983
ALASKA CONSTITUTION ARTICLE 1, SECTION 1

COUNT ONE

As his first cause of action against Defendants, Plaintiff would show unto the court as follows:

1. Plaintiff is a black citizen of

the state of Alaska and of the United States of America. Plaintiff had been employed as a member of the Anchorage fire department for approximately fifteen years when for a non-occupational illness he resigned on July 7, 1989. Plaintiff had advanced through the ranks to the position of Inspector, specifically plans examiner.

2. Due to non-occupational illness of hypertension Plaintiff was advised by his physician to seek less stressful employment and did so.

3. However, under a different environment and different treatment Plaintiff's condition improved to the extent that he sought to return to his old employment with co-defendants Municipality of Anchorage and Anchorage Fire Department. When on November 3, 1989 Plaintiff conversed with Larry Langston of the Anchorage Fire Department by phone

there was a vacancy. Plaintiff was advised, however, on November 17, 1989 that the matter was out of Langston's hands and Plaintiff would have to see Neil Koeniger, Manager Employee Relations-Personnel Office. However, Plaintiff was not advised of his right to return as an inspector, but advised that his return must be as Firefighter III. Plaintiff also had under personnel rule 5.2(b) rehire rights which were denied him by all defendants in violation of his contract rights and civil rights.

a. Pursuant to Article 10.1.3 and Personnel Rule 5.2(b) of the Firefighter's contract with the Municipality, (1980 Edition), plaintiff was entitled to preferential reemployment rights after occupational illness applicants and employees, conditioned on medical certification of the person's

physical or mental ability to perform the job for which they are applying and their passing entry physical ability tests as required by the job description. "...Such preferential reemployment rights shall be predicted (sic) on the existence of an open position, regardless of vacancy factor, was a part of the labor contract."

4. Despite this provision, and personnel rule 5.2(b), when Plaintiff within the one year contacted Langston, the fire chief, and sought to return, he was denied the benefit of the above sections as well as the benefit of A.S. 18.80.210; and A.S. 18.80.220; by having a limitation placed upon him of returning only as a Firefighter III rather than Inspector, the position held by him when he left. There was also a violation of Plaintiff's 14th amendment rights to the equal protection of the law. He was also

deprived of the rights guaranteed by Article 1 Section 1, of the Alaska Constitution.

5. That instead of being advised of his rights to return as an inspector in case of a vacancy, he was advised in writing by Defendant Anchorage Fire Department through Chief, Larry J. Langston, that his return would be as Firefighter III. Plaintiff tried unsuccessfully to get his union, a co-defendant herein and his attorney, Dunnagan a co-defendant herein to timely grieve this discrimination on his behalf, but both refused.

6. Not only did defendants Municipality of Anchorage, the Union, and Anchorage Fire Department breach their duty to Plaintiff by failing to advise him of his right to return as an Inspector, but they also failed to list him in any

ranked or unranked eligible candidate list for the position of Fire Inspector during the period from May 18, 1990 through July 1, 1990, and during the period from July 1, 1990 through July 1, 1992. That the extension of the period through July 1, 1992 was in violation of personnel and union regulations. That defendants by design adjusted the promotional list to damage Plaintiff specifically.

7. Plaintiff met all qualifications of contract provision 10.1.3 and Personnel Rule 5.2(b) (1980 Edition), and supplied proof of physical ability to perform fire Inspector services. Langston told Plaintiff inspector positions were open, but he must return as a Firefighter III. There were two positions for fire Inspectors to which white individuals were promoted at the time that Plaintiff was being employed as a lower ranking

Firefighter III on May 24, 1990. Plaintiff was not informed about these positions and was not on a rehire list for these positions and was thus denied the equal protection of the law. The deadline for Plaintiff to grieve this discriminatory act on the part of the Municipality and the fire department was December 30, 1990 as was determined by an Arbitrator agreed upon by the parties. Under union regulations only the union could grieve this violation but despite plaintiff's request the union and his attorney hired through the union refused to timely do so. All Defendants acting under color of law, conspired to deprive him of his constitutional rights.

8. The parties, through the union, Plaintiff and the Municipality submitted the matter finally to Arbitration, said Arbitration to be binding on all matters

presented for decision to said arbitrator. That the union and the union attorney, also plaintiff's attorney, refused to include all causes of action which plaintiff sought to have included.

9. The hands of Plaintiff were tied as far as presenting a grievance except through the union. However, the Arbitrator held that rehire in the same position was a right which Plaintiff had and upon which the statute of limitations had run by the time the union exercised it on his behalf. That the co-defendants Jermain, Dunnagan & Owens were the attorneys for the union and for plaintiff and as such, under a duty to fairly represent the plaintiff. That they likewise, through the services of Dunnagan, refused to timely file the grievance requested by plaintiff or to properly apply 10.1.3, and personnel Rule

5.2(b) to him. That the union thus breached its duty of fair representation to plaintiff.

10. The arbitrator found that Article 10.1.3 and Rule 5.2(b) covered Plaintiff and that at the time of his rehire on May 24, 1990 as a Firefighter III two persons had been recently selected for promotion to the position of Fire Inspector, that Mr. Wilson was not informed of these positions and was not on a rehire list for these positions. The arbitrator further found that in an ideal world, Plaintiff should have been told and considered for rehire into one of those positions.

11. Because of the limited scope of jurisdiction of the arbitrator, and the refusal of Plaintiff's attorney and his union to present all questions, he could not grant Plaintiff relief under Alaska

civil rights statutes, but that relief is available through this court.

12. As a result of the violation of Plaintiff's constitutional rights to rehire he is suffering irreparable injury due to the joint actions of all defendants. His position as Plans Inspector was a highly technical one requiring constant study and experience. By being deprived of the opportunity to keep abreast of his field in this profession it may take years for him to catch up. By being kept from the rehire list, he will be required to undergo written examinations and deprived of the benefit of 10.1.3 and Personnel Rule 5.2 (b) (1980) the United States Constitution and the Alaska Constitution.

Wherefore Plaintiff prays for

1. Damages resulting from denial of employment rights and duty of fair

representation in the sums he was denied because of failure to rehire to all possible Fire Inspector positions to which he could have been appointed from November 13, 1989 to such time as Plaintiff is actually properly appointed and receiving his proper salary.

2. Damages for the humiliation and embarrassment which Plaintiff has undergone as a result of having to work as a Firefighter III.

3. Damages for the time which Plaintiff must spend in preparing to reach the stage he would have reached in his profession had he not been denied his proper reemployment.

4. Damages for denial of civil rights.

5. Restoration of retirement fund which Plaintiff has had to withdraw in the amount of $58,000.00 plus interest.

6. Reasonable costs and attorney fees.

7. All other relief right and proper.

COUNT TWO

COMPLAINT FOR MANDATORY INJUNCTION AND INJUNCTIVE RELIEF (A.S. 09.40; Civil Rule 65)

As a second cause of action Plaintiff would show unto the court as follows:

1. Plaintiff incorporates herein by reference all allegations set forth in count one above.

2. Plaintiff is facing irreparable injury for which there is no adequate remedy at law. Plaintiff is entitled to the benefit of A.S. 09.40. and Civil Rule 65.

Wherefore Plaintiff prays

1. For a mandatory injunction that Defendants forthwith place Plaintiff in

his former position as Plan Inspector with all benefits of the position.

2. For funds and time for bringing his skills and knowledge to where they would have been had the proper rehire not been withheld from him.

3. For costs and attorney fees.

4. For all other relief right and proper.

COUNT THREE

COMPLAINT FOR VIOLATION OF CIVIL AND EMPLOYMENT RIGHTS BY THE INTERNATIONAL ASSOCIATIONS OF FIRE FIGHTERS LOCAL 1264

1. As a third cause of action against the International Associations of Fire Fighters Local 1264 plaintiff incorporates by reference herein all matters set forth in counts one and two above.

2. That as a member of said labor union Plaintiff is entitled to fair and complete representation from same, but despite this right to fair and complete representation the president of said local did enter into an agreement with the municipality of Anchorage contrary to the rights guaranteed by the union rules as set forth under 10.1.3 and Personnel Rule 5.2(b) in agreeing that the plaintiff return to work only as Firefighter III rather then as an Inspector in view of his having terminated his position on account of a non-occupational illness.

3. That in view of the failure to advise plaintiff of his rights or process same, plaintiff has been damaged in a sum that will be proved at the time of trial and has suffered physical and mental anguish and humiliation. That despite the obligation of the union to stand by

Plaintiff, the Union has collaborated with the municipality to the injury of Plaintiff and has failed to recognize the rights of plaintiff to the equal protection of the law. That despite Plaintiff's insistence that he should have had a grievance filed for this the union refused to process this grievance in a timely manner as found by the Arbitrator. That inasmuch as plaintiff could only bring a grievance through the union plaintiff was irreparably damaged to the extent that when the union did finally bring a grievance on his behalf on the failure to promote it did not apply to plaintiff. The question of whether plaintiff terminated because of a non-occupational illness was presented but no remedy was sought thereunder or could be sought thereunder due to untimeliness.

4. That the union has an obligation

to fairly represent Plaintiff, but refused to furnish him representation for the processing of this grievance in a timely manner or to bring his law suit for redress for denial of his civil rights by the Municipality.

Wherefore plaintiff prays for damages against the union for all sums which he would have received had there been a timely reappointment had the union stood by him, for all damages which he would have received had the union processed his grievance in a timely fashion, for damages for all the humiliation and pain and suffering caused plaintiff by the failure of the union to fairly represent and support him.

COUNT FOUR

AMENDED COMPLAINT AGAINST THE FIRM OF JERMAIN, DUNNAGAN, & OWENS P.C. FOR MALPRACTICE

Appendix G16

As a fourth cause of action, the plaintiff would show unto the court as follows:

1. Plaintiff incorporates by reference herein all matters sent forth in counts one, two and three above. That as the attorney retained by the union to represent its members, and specifically calling himself the attorney for plaintiff, the defendants Jermain, Dunnagan, & Owens, a legal professional corporation has failed to properly represent plaintiff. Charles Dunnagan failed to properly represent the plaintiff.

2. That the firm after the return of Plaintiff in a menial capacity of Firefighter rather than as Inspector, which was his right, plaintiff tried to convince Dunnagan a member of said professional corporation, assigned to this

particular union, that he was covered under article 10.1.3 of the firefighters contract with the municipality, but the said Dunnagan refused to properly process his claim thereunder. The union followed Dunnagan's advice and failed to timely process his claim. (See Exhibit two attached hereto).

3. That the union following the advice of the said Dunnagan would only grieve the failure to promote which was not the proper claim to be processed under this particular set of circumstances. That because of the failure of said professional corporation to properly process the lack of Preferential hire plaintiff has been damaged in a sum to be proved at time of trial equal to all benefits which he has lost because of this failure to fairly represent.

4. That subsequent to the hearing

before the arbitrator, and after a finding by the arbitrator that plaintiff was properly covered under 10.1.3 and Personnel Rule 5.2 (b) the said Dunnagan failed to pursue plaintiff's claim for violation of his civil rights although recognizing that such a claim existed. That because of this failure plaintiff has had to hire other counsel to protect the rights which Dunnagan as attorney for the union and also plaintiff's attorney, has refused in any manner to assist plaintiff with his claim for violation of his civil rights.

5. That the said Dunnagan has threatened to see to it that none of the union members in any manner assist Plaintiff with his claim, thus working actively against Plaintiff and causing other union members to work against him in the attempt to obtain the rights which he

had an obligation to obtain for Plaintiff.

Wherefore Plaintiff prays for a judgment against the firm of Jermain, Dunnagan, & Owens, P.C in an amount to compensate him for all rights which he has been deprived of by the joint actions of the municipality, the fire department and the union, for damages as a result of the improper interpretation of Union rules and regulations statutes and constitutional provisions, for the mental and physical anguish which he has suffered because of same and for all other relief right and proper in the premises.

COUNT FIVE
COMPLAINT FOR REHIRE RIGHTS

1. Plaintiff reasserts all allegations set forth in Counts one through four above.

2. Plaintiff was an employee in good standing of the Municipality of Anchorage

and a member in good standing of the International Association of Firefighters Union Local 1264.

3. That on or about the 7th of July 1989 plaintiff gave notice, a copy of which is attached here as Exhibit one, of his resignation for a non-occupational illness, hypertension. 4. That in less than a year, his health improved dramatically and he sought to return to his former position, that of Fire Inspector as was his right under the collective bargaining agreement which he as a union member was entitled to the benefit of, Article 10.1.3 and Personnel Rule 5.2(b).

5. That his right under these provisions was denied him and instead the personnel officer, the fire chief, and the union president conspired to deprive him of the right to return as a Fire Inspector

and allowed him to return only as a Firefighter III, which amount to a demotion.

6. That no legitimate reason was given for this act of denial of his contract rights and no reason existed for same.

7. That because of this denial of his reemployment rights plaintiff has been damaged in a sum to be proved at the time of trial but not estimated to be in excess of one million dollars.

Wherefore, plaintiff prays for an action of this court restoring unto him his rehire rights, his retroactive benefits of all kind including back pay, damages for the humiliation he has suffered, for the deprivation, costs and attorneys fees and all other relief right and proper in the premises.

Dated this 31st day of December,

1992.

DICKERSON & GIBBONS, INC.

BY_____
M. Ashley Dickerson

VERIFICATION

State of Alaska)
) ss
Third Judicial District)

I, Jesse Wilson, hereby certify that I am the Plaintiff in the above cause of action. I have read the foregoing complaint consisting of four counts. I hereby certify and affirm that all matters alleged therein are true. I am suffering irreparable injury and in dire need of immediate relief.

Dated this 31st day of December, 1992.

_____
Jesse Wilson

Subscribed and sworn to be me this 31st day of December, 1992.

_____
Notary Public, State of Alaska
My Commission Expires:

This is to certify that a true
and correct copy of the foregoing
was served by regular U.S. mail,
postage paid, on the Municipal
Attorney, Richard L. McVeigh,
Charles Dunnagan and Hughes, Thorsness
on this 31st day of December, 1992.

_____

M. ASHLEY DICKERSON

JESSE WILSON; TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased

Plaintiffs - Appellants

v.

MUNICIPALITY OF ANCHORAGE, et al,; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1264

Defendants

and

JERMAIN, DUNNAGAN, OWENS, P.C.

Defendant - Appellee

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 02/11/94

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

APR 12 1994

by: /s/
Deputy Clerk

42 U.S.C. § 1983 states:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within this jurisdiction eq laws. Fourteenth Amen States Constitution, S

14th amen

J1

October 24, 1990

Tim Cornelius, President
IAFF Local 1264
1200 E. 76th, #1227
Anchorage, AK 99518

RE: Jessie [sic] Wilson Re-Employment/Promotion

Dear Tim:

Based on our conversations of Wednesday, October 24, I feel it necessary to write a follow-up to my letter of October 3 on Jessie [sic] Wilson's re-employment rights. It now appears that the facts on which my advice was based may have been incorrect. I withdraw my recommendation that the union take further action on Jessie [sic] Wilson's re-employment situation.

At our meeting of October 2 with Jessie [sic] Wilson, you and I came away with the impression that Jessie [sic] Wilson had terminated his employment with the department because of a non-occupational medical disability. He presented a memo dated July 7, 1989, which he had sent to Larry Langston and which Langston had signed. Wilson had a long history of problems with hypertension. We didn't inquire further into the matter, although it now appears we probably should have.

In recent conferences with Chief Langston, it has been learned that Wilson's termination was never regarded as

a disability termination. It was regarded as a voluntary termination. Langston has stated that Jessie [sic] Wilson was not able to produce medical records or testimony sufficient to create any kind of medical disability sufficient to have barred him from employment with the fire department. That means there is a legitimate, good-faith dispute over whether Jessie [sic] terminated by virtue of a non-occupational illness or disability.

My initial analysis of Jessie [sic] Wilson's re-employment rights was based on a non-occupational disability termination. That would have given Jessie [sic] Wilson certain preferential rights under Article 10 of the collective bargaining agreement. Since there is now a dispute over the circumstances of Jessie's [sic] termination, I have to withdraw my initial recommendation.

Recommendation

Jessie [sic] Wilson should be informed that the department disputes Jessie's [sic] assertion that he left the department due to non-occupational disability or illness. Although Jessie was experiencing medical problems, the department does not believe that those medical problems required Wilson's resignation. We should ask Jessie [sic] Wilson to forward to us any medical statements of other evidence showing that the department is incorrect and which would prove that Jessie [sic] Wilson's termination from the department was the result of direct medical advice from a treating physician.

If you have any questions, please call.

Best regards,

JERMAIN, DUNNAGAN & OWENS, P.C.

Charles A. Dunnagan

Supreme Court, U.S.
FILED
JUL 28 1994
OFFICE OF THE CLERK

94-80
No.

In The

Supreme Court of the United States

October Term, 1994

TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,

Petitioner,

vs.

MUNICIPALITY OF ANCHORAGE; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN and OWENS, P.C.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Municipality of Anchorage
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Assistant Municipal Attorney
P.O. Box 196650
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(907) 343-4545

Attorney for Municipality of Anchorage and Anchorage Fire Department

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Municipality of Anchorage
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P.O. Box 196650
Anchorage, Alaska 99519-6650
(907) 343-4545

Attorney for Municipality of Anchorage and Anchorage Fire Department

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QUESTIONS PRESENTED FOR REVIEW

A. Whether or not the U.S. Supreme Court should deny the Petition for Writ of Certiorari?

B. Whether the Court of Appeals for the Ninth Circuit correctly affirmed the U.S. District Court's decision to grant the Municipality of Anchorage's and the Anchorage Fire Department's Motion for Summary Judgment on the grounds that petitioner's decedent, Jesse Wilson, did not and could not establish a prima facie case of conspiracy to deprive him of equal protection under the laws under 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

FORMAL DESCRIPTION OF OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISION STATUTES, ORDINANCE AND REGULATIONS 2

CONCISE STATEMENT OF THE FACTS 4

ARGUMENT 8

A. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 8

1. The court did not depart from the accepted and usual course of judicial proceedings 8

2. The court's decision is not in conflict with applicable Supreme Court or another decision of a Court of Appeals 9

a. Class based animus or discriminatory intent .. 9

b. Fundamental rights 10

c. The Court of Appeals for the Ninth Circuit did not require a higher burden of proof to defeat a Motion for Summary Judgment than the United States Supreme Court 11

d. The court's decision is not in conflict with another decision of a Court of Appeals on the determination of what questions are in the province of the jury 11

3. There are not any important federal law questions presented that haven't already been decided by this court 12

4. Attorney's fees issues 12

B. THE COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY AFFIRMED THE DECISION OF THE UNITED STATES DISTRICT COURT, DISTRICT FOR ALASKA 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases Cited: Page

Adickes v. S.H. Kress and Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 11

Coverdell v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987) 11

Dixon v. City of Lawton, Oklahoma, 898 F.2d 1443 (10th Cir. 1990) 12

Dooley v. Reiss, 736 F.2d 1392 (9th Cir. 1984) 12

General Building Contractors Association v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) 10

Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1975) 10

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) 11,12

Massachusetts Board of Retirement, et al. v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) 10

McDonald v. City of West Branch, Michigan, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed. 2d 302, (1984) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 9

Meiri v. Dacon, 759 F.2d 989, 998 (2nd Cir. 1985) 11

Mescall, et al. v. Burrus, et al., 603 F.2d 1266 (7th Cir. 1979) 10,11

Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990) 9

Personnel Administrator of Massachusetts, et al. v. Fenney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed. 2d 870 (1979) 10

U.S., et al. v. Washington, et al., 774 F.2d 1470 (9th Cir. 1985) 9

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2d 597 (1976) 9

Constitutional Provisions

United States Constitution

Amendment XIV, Section 1 2

United States Code

28 U.S.C. § 1254 1

28 U.S.C. § 1291 7

28 U.S.C. § 1442 6

42 U.S.C. § 1981 9,10

42 U.S.C. § 1983 . . . . . 1,2,6,7,8, 9,10,11,12,15

42 U.S.C. § 2000e *et seq.* (Title VII) 9,10

Supreme Court Rules

Supreme Court Rule 10.1 8,13,15

Supreme Court Rule 15.1 13

Alaska Statutes

AS 18.80.210 6,7

AS 18.80.220 6,7

Anchorage Municipal Code

AMC 3.30.052(B) (Personnel Rule 5.2(b)) 2,4

Other Authorities

Labor Contract Agreement Between Municipality of Anchorage and International Association of Firefighters § 10.1.3 3,4

FORMAL DESCRIPTION OF OPINIONS BELOW

A formal description of opinions below has been provided in the Statement of the Case.

JURISDICTIONAL STATEMENT

The Petitioner is petitioning the court to review the Court of Appeals for the Ninth Circuit's decision dated February 11, 1994. The Court of Appeals for the Ninth Circuit denied the Petition for Rehearing on April 4, 1994. The U.S. Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS RELIED UPON

United States Constitution

Article XIV.

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

42 U.S.C.S. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Anchorage Municipal Code

3.30.052 Types of Eligible Lists

(B) Rehire List (Personnel Rule 5.2(b))

An employee who separated in good standing may have his name placed on a rehire list for the same class of position, or a lower class in the same or a parallel series

with the advance approval of the director, provided he so requests in writing within one year from date of separation. Names of employees eligible for rehire shall be certified as additional, unranked eligibles on promotional and open-competitive eligible lists. Eligibility to remain on the rehire list expires one year from date of separation.

Labor Contract Agreement
Between Municipality of Anchorage and
International Association of Firefighters

Article 10 REHIRING PROCEDURE

10.1.3 Any former employee of the various job classifications covered by the agreement or any preceding agreements, who terminated due to non-occupational injury or illness will be granted preferential reemployment rights after occupational injury applicants and employees. Such reemployment rights shall be conditioned on medical certification of the person's physical or mental ability to perform the job for which they are applying and their passing entry physical ability test as required by the job description. Such preferential reemployment rights shall be predicted on the existence of an open position, regardless of vacancy factor.

CONCISE STATEMENT OF THE CASE

Jesse Wilson, Petitioner's decedent, (hereinafter Wilson) joined the Anchorage Fire Department for the Municipality of Anchorage in 1974. On July 7, 1989, Wilson advised Fire Chief Langston of his desire to terminate his employment with the Anchorage Fire Department because of his hypertension. CR 44, Exhibit D. Chief Langston did not make any assurances that Wilson could return as a Fire Inspector, which was the position Wilson held at the time of his resignation. On August 7, 1989, the Police and Fire Retirement Board, which has the authority to determine non-occupational or occupational disabilities, denied Wilson's request for a permanent non-occupational disability for hypertension since the evidence he submitted did not show that he was unable to work as a Fire Inspector, or was disabled by the hypertension. CR 44, Exhibit F.

In November 1989, Wilson sought to return to the Anchorage Fire Department and contacted Chief Langston. On November 13, 1989, Tim Cornelius, President, International Association of Firefighters, Local 1264, Chief Larry Langston, and Neil Koeniger, Personnel Director, entered into a written agreement that Wilson could return to employment as a Firefighter III, and would have to compete for a Fire Inspector position after rehire. CR 44, Exhibit J. This meeting took place to ensure the benefits of and compliance with § 10.1.3 of the collective bargaining agreement.

Section 10.1.3 of the collective bargaining agreement governs the rehire procedures for individuals who terminated their employment because of a non-occupational illness or injury. It provides that a former employee will be granted preferential reemployment rights. Section 10.1.3 does not provide that Wilson could return as a Fire Inspector within two (2) years, nor does Personnel Rule 5.2(b) provide that Wilson has the right to return to his former job within one year. Personnel Rule 5.2(b) provides that one's name will be placed on an eligibility list, but it does not guarantee rehire.

In February of 1990, Wilson requested to be rehired in accordance with the provisions of the November 13, 1989 letter.

CR 44, Exhibit K. In a letter dated February 22, 1990, Langston told Wilson that in accordance with the November 13, 1989 letter, Wilson needed to provide a medical release stating that he was now able to work as a Firefighter without reservations of any kind, and that he would need to take and pass the firefighter physical ability test prior to being accepted. Once these steps were completed, then he would be hired as a Firefighter III with departmental seniority and date of rank as of the date of rehire. CR 44, Exhibit M.

During March and April, Wilson was permitted to take the Standard Physical Abilities Screening Exercise Test three times. He had to pass the test to qualify for the Firefighter III position. CR 44, Exhibit X. Wilson was also required to obtain a second doctor's letter that indicated he could work as a Firefighter III without restrictions. His first doctor's letter did not say this or comply with the February 22, 1990 letter. CR 44, Exhibit X and Y. After fulfilling these requirements, Wilson attended orientation on May 23, 1990. On May 22, 1990, Chief Langston wrote a memo to "All Personnel" to announce the promotion of Baird and Carpenter to two Fire Inspector positions effective June 4, 1990. CR 44, Exhibit N. The selection of these two employees was made on May 18, 1990. CR 44, Exhibit X.

On June 29, 1990, Wilson requested a promotion to Fire Inspector. CR 44, Exhibit O. On July 5, 1990, Chief Langston informed Wilson that he had to compete for a Fire Inspector position as stated in their agreement. CR 44, Exhibit P. To qualify for a Fire Inspector position, an individual must serve two (2) years as a Firefighter II in the Anchorage Fire Department and serve five (5) years with an organized (paid) Fire Department. <u>After</u> these qualifications are met, individuals may test and compete for inspector positions, as provided in collective bargaining agreement, Article 18. A promotional list is compiled after testing. Candidates are ranked in order of qualifications. The first candidates on the list are offered the next available job. The highest ranked candidate from the list who accepts, receives the job. CR 44, Exhibit Q. Candidates are selected off the promotion list through the duration of the list. This promotional list was extended for another year upon the request of the union to comply with Article 18 of the collective bargaining agreement.

From October, 1990 to July 1991, the International Association of Firefighters, Local 1264 (hereinafter the Union) on behalf of Wilson presented two grievances which were denied by the Municipality at both steps of the grievance process. CR 44, Exhibit R and S. Pursuant to the collective bargaining agreement, the Municipality dealt with the union which was representing Wilson. The matter proceeded to arbitration. On December 4, 1991, the arbitrator, T.W. Patch rendered his decision: "I cannot find Mr. Wilson's grievance to be timely when filed on July 23, 1991." CR 44, Exhibit U. Therefore, Wilson was not entitled to any relief. He was not entitled to be placed on the promotional list or receive the position of inspector except in accordance with the above described procedures nor was Wilson given the right to return to his former position.

Wilson filed a complaint in the Superior Court, Third Judicial District, State of Alaska, against the Municipality and the Fire Department alleging violations of AS 18.80.210 and AS 18.80.220, a breach of the Collective Bargaining Agreement, and race discrimination. CR 1-17. Wilson later amended his complaint adding the Union and the law firm of Jermain, Dunnagan & Owens as defendants, and alleging a violation of the Fourteenth Amendment of the U.S. Constitution. *See* Petitioner's Appendix, G1-24. Wilson later identified a claim for violation of 42 U.S.C. § 1983 (although this was not specifically stated in the complaint).

The Anchorage Fire Department removed the matter to U.S. District Court, District of Alaska. CR 1-1. Subject matter existed over Wilson's original claims under 42 U.S.C. § 1983. The court exercised pendant jurisdiction over the related non-federal claims. The federal question established removal jurisdiction pursuant to 28 U.S.C. § 1442. All parties moved for summary judgment on all issues. CR 19, 44, 53. On January 31, 1993, the U.S. District Court, District of Alaska rendered summary judgment in favor of all the defendants and denied Wilson's motion for summary judgment. *See* Petitioner's Appendix, D1-16. The court dismissed Wilson's 42 U.S.C. § 1983 claim with prejudice, stating:

> In the instant case, beyond the bare fact that Wilson is black, there appears to be no support for his claim that the allegedly unfair treatment he received was racially motivated. Neither does Wilson proffer any evidence suggesting that the fire department has historically discriminated against blacks. *See* Petitioner's Appendix at D-11.

Contrary to Petitioner's arguments, the court did not find that "the hiring of another minority evidently negated any claim of racial bias", that Wilson had less rights than a person of another race, or that "the right to a promotion was not of sufficient importance to justify the claim of equal protection." Although Wilson did not present a substantive due process claim, the court found that the property interests implicated in the case did not support a substantive due process claim. *See* Petitioner's Appendix at D-13. The court did not admit by implication that there was a mistake in its decision, as alleged by the Petitioner. There was not a ruling on the merits of the breach of the labor contract agreement and the personnel rules or a violation of AS 18.80.210 and AS 18.80.220. These claims were dismissed without prejudice. *See* Petitioner's Appendix D-14.

On March 17, 1993, Wilson appealed the judgment in favor of the defendants to the U.S. Court of Appeals for the Ninth Circuit. Pursuant to 28 U.S.C. § 1291, the Court of Appeals for the Ninth Circuit exercised its jurisdiction. Wilson did not appeal the issue of whether it was an abuse of discretion for the court to dismiss the state claims without prejudice. The Ninth Circuit found that Wilson did not present any evidence tending to prove a racial discriminatory purpose behind the rehire agreement or offer anything other than conclusory allegations. *See* Petitioner's Appendix at E-5 and 6. The Ninth Circuit affirmed the District Court's decision to enter summary judgment in favor of all defendants on the claim of a civil conspiracy pursuant to 42 U.S.C. § 1983 which Wilson claimed deprived him of his constitutional rights to due process and equal protection. *See* Petitioner's Appendix at E1-6.

ARGUMENT

A. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The U.S. Supreme Court should deny the Petition for Writ of Certiorari because the Court of Appeals for the Ninth Circuit has not rendered a decision in conflict with a decision of another United States Court of Appeals on the same matter or applicable decisions of this Court. Furthermore, the Court of Appeals for the Ninth Circuit has not departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the lower court.

1. The court did not depart from the accepted and usual course of judicial proceedings.

The Petitioner argues that the presented facts established a conspiracy under 42 U.S.C. § 1983. Petitioner alleges that the Court of Appeals for the Ninth Circuit ignored evidence or the lack of evidence allegedly not presented by the Respondents. There is no indication in the record that the Court of Appeals for the Ninth Circuit ignored any evidence that was presented by the parties. All of the evidence and arguments were fully briefed to the U.S. District Court, District for Alaska and the Court of Appeals for the Ninth Circuit. The opinion of the U.S. Court of Appeals for the Ninth Circuit shows that it reviewed all of the evidence and did not find evidence to support Wilson's claim.

Petitioner also alleges that the court erroneously analyzed the facts that had already been decided by an arbitrator. Petitioner fails to recognize that an arbitration decision and factual findings are not binding in federal courts in civil rights cases. *See McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984). The court is within its discretion to analyze and weigh the facts as it deems appropriate. Simply because the Petitioner does not like the way the court analyzed the facts presented is not a reason for granting certiorari as set forth in Sup. Ct. R. 10.1, and does not establish that the court departed from the usual course of judicial proceedings.

Petitioner also alleges that the Court of Appeals for the Ninth Circuit did not conduct a de novo review as required by *U.S. et al. v. Washington et al.*, 774 F.2d 1470 (9th Cir. 1985) and *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990). The record does not substantiate a claim that the Ninth Circuit did not conduct a de novo review or merely reiterated the opinion of the court below. None of Petitioner's allegations support the claim that the court departed from the usual course of judicial proceedings.

2. The court's decision is not in conflict with applicable Supreme Court or another decision of a Court of Appeals.

a. Class based animus or discriminatory intent.

Petitioner alleges that the Court of Appeals for the Ninth Circuit and U.S. District Court, District of Alaska have imposed a new and special requirement that the Petitioner show black animus before proving a violation of 42 U.S.C. § 1983. Petitioner's interpretation of the law is erroneous.

Petitioner alleges that she used *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1978) to prove her case and that *McDonnell Douglas* does not require a showing of class based animus. *McDonnell Douglas* sets forth the burdens for proving a discriminatory rehire under 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964). Petitioner did not allege a violation of 42 U.S.C. § 2000e *et seq.* She alleged a conspiracy to deprive Wilson of his equal protection under 42 U.S.C. § 1983. Thus, the *McDonnell Douglas* analysis was not applicable to this case.

Further, the Court has always required a showing of discriminatory intent or purpose or animus to prove a violation of equal protection, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. 2000e *et seq.* In *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2050, 48 L.Ed.2d 597, 607 (1976), the court stated that purpose or intent to discriminate must be established for a violation of equal protection. "Discriminatory purpose" means

more than intent by volition or intent as awareness of consequences. *See Personnel Administrator of Massachusetts, et al. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2299, 60 L.Ed.2d 870, 887 (1979). Discriminatory purpose implies that a decision maker selected or reaffirmed a particular course of action, at least in part, "because of", not merely "in spite of", its adverse effects on an identifiable group. *Id.* Purpose or intent to discriminate must also be established for a violation of equal protection under 42 U.S.C. § 1983. *See Mescall et al. v. Burrus et al.*, 603 F.2d 1226 (7th Cir. 1979). Under 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964), a plaintiff must also allege that he has been treated less favorably than his peers because of a class based animus and thus, must prove discriminatory animus towards himself. *See Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1975). Likewise, in 42 U.S.C. § 1981 cases, claims can only survive on a showing of intentional discrimination. *See General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982). The Court has consistently held that class based animus or discriminatory intent or purpose must be shown to establish violations of the equal protection clause and civil rights acts such as Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. The Court of Appeals for the Ninth Circuit, like other circuits, followed the requirements of proof as set forth by this Court. Thus, the decision of the U.S. Court of Appeals for the Ninth Circuit did not conflict with any decision of another U.S. Court of Appeals, or deviate from the rulings of the U.S. Supreme Court.

b. Fundamental rights

Petitioner alleges that the right to rehire, the right to work, and the rights guaranteed in the collective bargaining agreement and in the personnel rules are fundamental rights, and that the court wrongly ignored these fundamental rights. However, in the trial court, the petitioner never alleged that the right to work is a fundamental right. More importantly, this Court has ruled that the right to public employment is not a fundamental right. *Massachusetts Board of Retirement et al. v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520, 521 (1976). Therefore, the Court of Appeals for the Ninth Circuit's decision on the issue of

fundamental rights does not conflict with applicable decisions of this Court.

c. The Court of Appeals for the Ninth Circuit did not require a higher burden of proof to defeat a Motion for Summary Judgment than the United States Supreme Court.

The U.S. Court of Appeals for the Ninth Circuit did not issue a decision that was in conflict with *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The Petitioner pursued a claim of a conspiracy to violate Wilson's equal protection rights pursuant to 42 U.S.C. § 1983. Petitioner is required to meet the burdens of proof to show a violation of 42 U.S.C. § 1983 and a violation of the equal protection amendment. *See Mescall et al. v. Burrus et al.*, 603 F.2d 1226 (7th Cir. 1979); *See also Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979). To defeat a motion for summary judgment, Petitioner had to show more than conclusory allegations. *See Meiri v. Dacon*, 759 F.2d 989,998 (2nd Cir. 1985). A plaintiff cannot survive a motion for summary judgment without offering some supporting evidence of a civil rights violation. *Coverdell v. Department of Social and Health Services*, 834 F.2d 758, 769 (9th Cir. 1987).

Simply alleging a violation of a collective bargaining agreement does not show that Wilson has been discriminated against based on his race, or that he has been denied equal protection of the laws. Furthermore, unlike the company in *Adickes, supra.*, the Respondents rebutted all the conclusory allegations made by Wilson. The court applied the standard set forth in *Adickes*. Therefore, the U.S. District Court for the District of Alaska and the U.S. Court of Appeals for the Ninth Circuit did not give a higher standing to Ninth Circuit cases. The court did not require a higher level of proof to defeat a motion for summary judgment than in other decisions of the United States Supreme Court.

d. The court's decision is not in conflict with another decision of a Court of Appeals on the determination of what questions are in the province of the jury.

Petitioner alleges that the Court of Appeals for the Ninth Circuit's decision is inconsistent with the Seventh Circuit's decision in *Hampton v. Hanrahan*, 600 F.2d 600, 620 (7th Cir. 1979) because the Seventh Circuit stated that the existence or non-existence of a conspiracy is the essential factual issue that a jury, not the trial judge, should decide. In 42 U.S.C. § 1983 conspiracy cases, a plaintiff must allege and establish not only a conspiracy but also an actual deprivation of rights. *Dixon v. City of Lawton, Oklahoma*, 898 F.2d 1443, 1449 (10th Cir. 1990). *See also Hampton v. Hanrahan, supra.*, at 624. If an individual cannot show deprivation of a constitutional right, then the individual cannot establish a conspiracy to deprive him of that right under 42 U.S.C. § 1983. *Dooley v. Reiss*, 736 F.2d 1392, 1395 (9th Cir. 1984). A deprivation of rights could not be shown because Wilson could not establish a discriminatory purpose. It was within the court's authority to determine as a matter of law whether or not a deprivation of rights had occurred. The court did not rule on a factual question that is within the province of a jury. Thus, the court's decision to rule on the conspiracy issue did not conflict with another decision of a Court of Appeals.

3. There are not any important federal law questions presented that haven't already been decided by this Court.

Petitioner attempts to create an issue that has never been raised before in civil rights litigation to persuade this court to grant review. Contrary to Petitioner's assertions, the Court of Appeals for the Ninth Circuit did not decide that "a minority can be justly denied his constitutional rights by the substitution of another minority to that right." The court did not hold that a black American's rights are less important than a native American or another minority, or that another minority can be substituted in a job for a black American. Rather, in its opinion, the court referred to the Respondents hiring of minorities as Fire Inspectors when discussing the Respondents' past hiring practice. The court mentioned this fact while describing that Wilson could not show that he had been discriminated against based on race, or that the Respondents had historically discriminated based on race. In so doing, the Court clearly did not hold that minority substitutions are a justifiable constitutional violation. Thus, Petitioner's issue

of an important question of federal law which has not been settled by this court, does not exist. *See* Petitioner's Appendix at E1-6. Therefore, the Petition for Writ of Certiorari should not be granted.

4. Attorney's fees issues.

Wilson appears to be attempting to appeal the award of attorney's fees to the Respondents to the United States Supreme Court. There is no such right of appeal to this Court. The Court of Appeals for the Ninth Circuit was within its discretion to decide whether or not the Respondents may recover their partial attorney's fees because the appeal was frivolous. The Petitioner alleges that the attorney of record for the Petitioner was sanctioned for helping a civil rights litigant and that it was the court's intent to stifle civil rights litigation. The Petitioner is not in a position to speculate as to the court's intent in awarding attorney's fees.

There are not any reasons pursuant to Sup. Ct. R. 10.1 that would justify granting a review of this matter. Therefore, Respondents respectfully respect that the court deny this Petition for review.

B. THE COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY AFFIRMED THE DECISION OF THE UNITED STATES DISTRICT COURT, DISTRICT FOR ALASKA.

In compliance with Sup. Ct. R. 15.1, Respondents point to any perceived misstatements of facts alleged by the Petitioner that address the merits of the case.

First, the Petitioner erroneously asserts that no reasons were given for rehiring Wilson as a Firefighter III, for requiring him to compete for an inspector position, for extending the list to a two year list, and for leaving his name off this list. The reasons for these actions were fully briefed to the District Court, District for Alaska and the Court of Appeals for the Ninth Circuit.

Second, the Petitioner wrongfully asserts that the Respondents made false statements which confused the court. The

Petitioner continues to mischaracterize the Respondent's arguments to the District Court and to the Court of Appeals for the Ninth Circuit. Petitioner is referring to a footnote in the Respondent's Motion for Summary Judgment presented to the U.S. District Court. It was clear to the U.S. Court of Appeals for the Ninth Circuit and to the District Court what arguments were presented, and the Respondent's did not allege that Wilson was in the Fire Suppression section. Therefore, the District Court and the Court of Appeals cannot be confused about the organization of the Fire Department or the job held by Wilson.

Third, the Petitioner alleges the collective bargaining agreement procedures on union representation were changed because of Wilson's previous actions. The record is devoid of such evidence.

Fourth, the Petitioner wrongfully suggests that Wilson's death was caused by his employment with the Anchorage Fire Department. Wilson voluntarily returned to the department and provided medical documentation that he could work as a Firefighter III without restrictions. His heart attack did not occur on the job.

In summary, in entering its Judgment as a matter of law against Wilson, the court considered the fact that at his deposition Wilson could not identify anything in particular that indicated discrimination, and only Wilson made conclusory allegations to support his claim. The court also considered the fact that Wilson was given the opportunity many times to take the standard physical ability screening exercise test until he passed. Furthermore, the court considered that Wilson did not have any evidence that the Respondents historically discriminated against minorities. In fact, a minority had been hired in one of the available Fire Inspector positions. This evidence was presented in an affidavit to the U.S. District Court and the Court weighed this evidence in ruling against Wilson.

On January 11, 1994, this case was submitted to the Court of Appeals for the Ninth Circuit without oral argument. On February 11, 1994, the court issued its decision. In its decision the court accurately set forth all of Wilson's claims and the

standard that Wilson needed to meet to survive a motion for summary judgment in a civil rights action. Wilson simply had no evidence to support his claim of a conspiracy to deprive him of equal protection of the laws under 42 U.S.C. § 1983 and no evidence to defeat Respondent's Motion for Summary Judgment. The court properly affirmed the decision of the United States District Court, District for Alaska upon finding that there was simply no evidence to support these claims.

CONCLUSION

The Court of Appeals for the Ninth Circuit correctly affirmed the decision of the United States District Court, District of Alaska to grant summary judgment on the claim of a conspiracy pursuant to 42 U.S.C. § 1983 to deprive Wilson of his constitutional rights to due process and equal protection. Wilson could not present any evidence with the exception of conclusory allegations to support his claim. The Respondents rebutted all of these allegations.

More importantly, the Ninth Circuit's decision does not conflict with a decision of another United States Court of Appeals on the same matter or applicable decisions of this Court. The Court of Appeals for the Ninth Circuit did not depart from the accepted and usual course of judicial proceedings or sanctioned such a departure by the lower court. Therefore, no reason exists under Sup. Ct. R. 10.1 to grant this Petition for Writ of Certiorari. Respondents respectfully request that the Court deny this Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit.

DATED this 26th day of July, 1994, at Anchorage, Alaska.

RICHARD L. MCVEIGH
Municipal Attorney

By: Leslie K Schumacher
Leslie K. Schumacher
Assistant Municipal Attorney

Supreme Court, U.S.
FILED
AUG 2 1994
OFFICE OF THE CLERK

No. 94-80

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 19____

TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,
Petitioner,

v.

MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

M. Ashley Dickerson
Dickerson & Gibbons, Inc.
1330 East 15th Avenue
Anchorage, Alaska 99501
(907) 376-5539
ATTORNEYS FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
ARGUMENT.....	2
I. Respondents Have Not Combatted The Charges Of Denial Of Equal Protection And Conspiracy Because Of Leaving Wilson's Name From The Promotional Rehire List, Denying Him Union Fair Representation, Denying Him The Right To Return Within One Year To His Inspector's Position Under 5.2(b) And Denying Him The Right To Return Within Two Years Under 10.1.2.....	2
II. The Court Should Grant The Petition To Determine Whether The Denial Of The Benefit Of The Arbitrator's Findings Could Be Justified When No Civil Rights Issues	

Were Presented To The Arbitrator, Only Contractual Issues..... 6

III. The Court Should Resolve The Question Of Whether Granting Substitution And The Super Imposition Of An Extra Burden On A Black Litigant Takes Away His Equal Protection Rights..... 11

CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page
Cases:	
McDonald v. City of West Branch, Michigan, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984).....	8, 9
McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), 36 L.Ed. 688.....	5
Constitutional Amendments:	
Amendment XIV.....	12
Labor Agreement:	
Labor Contract Agreement between Municipality of Anchorage and International Association of Firefighters.....	1, 2 4, 7
Rules:	
Municipality of Anchorage Personnel Rules Effective January 15, 1990.....	1, 2 4, 5
Title 18.....	4

Federal Statutes:

42 U.S.C. § 1983..... 9, 10

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

I. The Court Should Grant The Petition To Resolve Whether The Respondents Successfully Combatted The Charge Of Denial Of Equal Protection And Conspiracy Because Of Leaving Wilson's Name From The Promotional Rehire List, Denying Him Union Fair Representation, Denying Him The Right To Return Within One Year To His Inspector's Position Under 5.2(b) And Denying Him The Right To Return Within Two Years Under 10.1.3.

II. The Court Should Grant The Petition

To Determine Whether The Denial Of The Benefit Of The Arbitrator's Findings Could Be Justified When No Civil Rights Issues Were Presented To The Arbitrator, Only Contractual Issues.

III. The Court Should Resolve The Question Of Whether Granting Substitution And The Super Imposition Of An Extra Burden On A Black Litigant Takes Away His Equal Protection Rights.

ARGUMENT

I. Respondents Have Not Combatted The Charges Of Denial Of Equal Protection And Conspiracy Because Of Leaving Wilson's Name From The Promotional Rehire List, Denying Him Union Fair Representation, Denying Him The Right To Return Within One Year To His Inspector's Position Under 5.2(b) And Denying Him The Right To Return Within Two Years Under 10.1.3.

The contention that there was never a claim that Wilson was in fire suppression is false. This was the only attempt at justification which respondents gave for

requiring Wilson to return as a firefighter III. The exact words are found at the record at CR 44-27, 28, n. 1, where the statement is made that since he was in fire suppression, the highest rank at which he could have possibly returned was firefighter III.

Plaintiff below sought sanctions because of this deliberate fallacious statement but the judge denied the motion for sanctions as well as the motion to strike submitted by the municipality without comment as to the false statement. The municipality wanted the reference to the false statement stricken. This is covered on page 7 of the original opinion below in the following words:

> I have considered defendants' motion to strike at Docket No. 61 and plaintiff's motion for sanctions at Docket No. 66 and find them to be without merit.

Admittedly, under the union contract if Wilson had been in fire suppression, he would have been required to return as a firefighter III. This clarification appears in a letter from JDO at CR 53-50.

Another fallacious statement appears in the statement of facts as presented by the respondents in the contention that a requirement to become an inspector required that you serve a certain length of time as a firefighter II. This appears on page 5 of the brief. At no time in the brief is there a reference to a particular rule justifying the action of the respondents.

Their reference to Title 18 as a means of keeping Wilson from returning as an inspector is without merit as no part of Title 18 deals with inspectors. Included therein are the positions of Fire Apparatus Engineer, Fire Captain, Senior Fire Captain and Paramedic II. The contention is further without merit as had there been an inclusion of inspector, there would have been no reason for leaving Wilson's name off the promotional list pursuant to rights guaranteed by 5.2(b).

It is strange that despite the rights given by 5.2(b) and 10.1.3, some strange act occurs without explanation for holding that Wilson was not entitled to these rights. No explanation is given anywhere

for why he was not given the benefit of his rights under personnel rules and the union contract. Even if the weak contention set forth that the fire department had not considered Wilson's termination due to a non-occupational illness, no explanation is given as to why he was not given the benefit of 5.2(b) which gives the right to return within a year to the same position. All municipal employees got this right. He returned in nine months. No legitimate business reason is ever given for why Wilson was kept from the rehire and promotional list, why he was denied the benefit of personnel and union contract agreements.

The way in which the rules were changed requiring that a member could only work through the union is shown in the record at CR 23-5. The way in which the fire department continued to advertise, having admittedly filled four union inspector positions during the period that Wilson was trying to return is not explained. We are still faced with the *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), 3(L.Ed. 688 theory of what logical legal business reason

could be given. None ever was.

Why did both courts insist that Wilson had an obligation to show that the respondents historically discriminated against blacks? Wilson had explained that he was not bringing a disparate treatment case as he was bringing the case strictly as an individual.

If no significance was attached to the fact that one of the four persons hired was a minority, why was it given prominence in the opinion of the district court and the opinion of the appellate court?

II. The Court Should Grant The Petition To Determine Whether The Denial Of The Benefit Of The Arbitrator's Findings Could Be Justified When No Civil Rights Issues Were Presented To The Arbitrator, Only Contractual Issues.

Can the rights given by an arbitrator's findings and conclusions be taken away when neither side appealed? Alaska law pertaining to appeals from arbitrators' awards provides that "the appeal shall be taken in the manner and to the same extent as from orders or

judgments in a civil action." AS 09.43.160.

Neither side appealed from the arbitrator's decision. Even though the arbitrator's decision was in favor of the municipality, it was only because of the fact that the union and the union attorney had violated the time constraints. JDO knew of this violation as a letter by a member of its firm had been written showing that the time had passed which is shown in the following words:

> Therefore, assuming that a grievance is available, it is my opinion, under the facts of this case and the language contained in the grievance procedure in the Agreement, that the chances of winning this grievance at arbitration are almost none. CR 53-41, p. 2.

The bringing of the question before the arbitrator was really a sort of save face gesture on the part of the union and JDO, the attorneys, since they were fully aware of time constraints, yet the question was presented to the arbitrator as to whether or not Wilson had 10.1.3

rights. The arbitrator found that he did.

The district court and the court of appeals referred to the case of *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) as showing that the decision of the arbitrator was not binding in a certain type of case. This was a civil rights case. However, that case could not be applicable to the situation here since the civil rights issue was not presented to the arbitrator. That phase of the case was given no attention by the union or the union attorney yet the union clearly admitted its error by stating in its excedrin letter:

> "As discussed Jesse Wilson should have been placed as an unranked eligibile (sic) per personnel rule 5 (b). This was recently discovered as Jesse and Ken McCoy were exploring the questions of under what rule was Jesse hired. What if any benifit (sic) to Jesse is there when considering PPI5100-004 sec. 3.4.9 along with now being listed as an unranked eligible.

> Enclosed are the relevant documents. thanks Chuck, Julie, Brad Ownens (sic) and the entire JDO staff who must resort to excederin (sic) assisting with difficult Firefighter issues!!!!!" CR53-50

We find these words at page 1800 of the case of *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984):

> (b) Although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would

undermine the statute's efficacy in protecting federal rights. This conclusion is supported by the facts that an arbitrator may not have the expertise to resolve the complex legal questions that arise in § 1983 actions or the authority to enforce § 1983; that a union's usual exclusive control over grievance procedures may result in an employee's loss of an opportunity to be compensated for a constitutional deprivation merely because it was not in the union's interest to press his grievance vigorously; and that arbitral factfinding is generally not equivalent to judicial factfinding. Pp. 1802-1804.

Only contractural issues were presented to the arbitrator so they should be accorded full effect. This was the only evidence presented in the case as the district court took no testimony.

III. The Court Should Resolve The Question Of Whether Granting Substitution And The Super Imposition Of An Extra Burden On A Black Litigant Takes Away His Equal Protection Rights.

If no significance was attached to the fact that one of the four persons hired was a minority, why was it given prominence in the opinion of the district court and the opinion of the appellate court? Both courts have emphasized the fact that another minority was promoted to one of the positions sought by Wilson. This court has never passed on the issue of minority substitution. Both courts have emphasized the fact that Wilson did

not show the deprivation or conspiracy to have been based on ethnicity. Is this to be a new requirement superimposed upon a minority? This issue has never been decided by this court.

CONCLUSION

Despite many references to cases bearing no similarity to the issue here, respondents have done nothing to dispel the fundamental premise that the constitutional rights of Wilson were violated and that he was denied equal protection as guaranteed by the Fourteenth Amendment by the combined acts of the municipality, the union, the fire department and the Union attorneys despite his failure to quote anyone as saying: "We are doing this because you are black."

DATED at Wasilla, Alaska this 1st day of August, 1994.

DICKERSON & GIBBONS, INC.

BY_____

M. ASHLEY DICKERSON

Certificate of Service

This is to certify that copies of the foregoing document were mailed to the Supreme Court of the United States and delivered to messenger for service on the following this ____ day of August, 1994:

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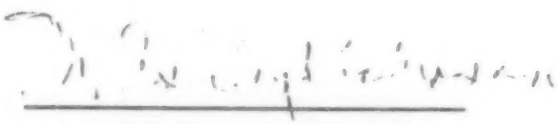

M. ASHLEY DICKERSON